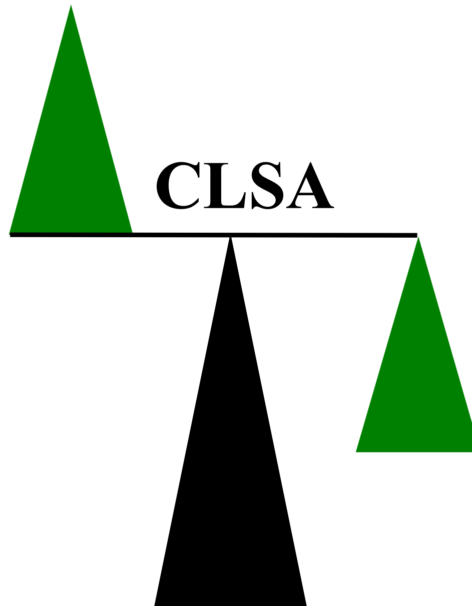

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THE CLSA Response to:

Sentencing Council invitation to comment on proposals to add expanded explanations to existing sentencing guidelines - response 23 May 2019

The Criminal Law Solicitors Association has considered the above consultation.

The CLSA represents criminal practitioners countrywide, and from a variety of types of criminal Practise, and whilst they attempt to represent the view of all practitioners, this response should be viewed as being of a representative sample only, as opposed to the views of each of its members.

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Q. 4. The C.L.S.A. are of the view that there have been many attempts to standardise and streamline sentencing within the Criminal Justice System over the past 12 years. The purpose of any sentence must include a level of certainty, and these further proposals do little to aid such certainty.

Whilst it has to be right that no person should gain economically from any criminal activity, this to an extent is dealt with by the Proceeds of Crime Act, and of course, the Courts have made it clear throughout the past 12 years that it is not cheaper to offend than comply. However, it is difficult to assess as to how any benefit can be quantified. Such benefit may be subjective or speculative, and therefore undermines the purpose of any sentence as proposed. Equally, in adhering to the formula as proposed for assessing a financial penalty, this immediately takes away a[illegible]
[illegible] may [illegible] hugely disproportionate in dealing with the ability to pay. This seems both arbitrary and unfair in the extreme. Often, those who are perceived to earn the most have pro rata much higher overheads.

The sentencing of Organisations may have a disproportionate impact within the proposals. It appears that the Courts are expected to overlook the true economic impact upon an Organisation and its ability to continue functioning without the loss of employment under these proposals.

Q.5. The guidance on when to organise a PSR is well established. However, this consultation seeks to draw a distinction between those who have mental health issues, as many do who come before the Courts, and give those vulnerable defendants an increased advantage over those who are less vulnerable. Whilst it has to be right that all who come before the Courts should have their circumstances viewed personally, this should not preclude those who do not suffer the same vulnerabilities than those automatically entitled to a report. Each case should be decided upon its own particular merits, not seek to exclude those who fall outside certain criteria.

Q.6. The proposed expanded explanations for statutory aggravating features appear unnecessary. There are current guidelines available which have served the Criminal Justice System well. By seeking to add other sub groups who are entitled to greater protection tends to exclude those who do not belong to certain groups. There is adequate protection for all parties within the current sentencing guidelines at present.

Q. 7. The CLSA have nothing to add as regards to this question. The proposals seem eminently sensible.

Q.8.The CLSA feels that these proposals are currently adequately dealt with within the current sentencing guidelines, and rather than create more certainty, these proposals tend to be more subjective. The purpose of sentencing has to be certainty, as well as punitive and rehabilitative. These proposals are superfluous. The Proceeds of Crime Act adequately deals with these issues as and when they arise.

Q.9
Vulnerable Victim.
The true vulnerability of any victim is dealt with well within the current sentencing guidelines. It is the experience of the CLSA that the Courts are highly conscientious in dealing with vulnerability, and this has to be right. Victim Impact Statements are there to assist the Judge in establishing vulnerability and ongoing harm, the CLSA are of the view that further amendments are superfluous.

Q.10.The CLSA are of the view that these proposals are eminently sensible, and overdue. Currently, they are taken into account in sentencing within domestic settings, however, there is research available which clearly indicates a higher level of culpability and effect of such actions.

Q.11 The proposals for expanding the explanations for aggravating factors are currently adequate in the opinion of the CLSA. The reason for stating this is that there appears to be an attempt to micromanage sentencing options and the bringing into play factors for which there is no need. For example, with coercive and controlling behaviour, an aggravating feature already exists where there is an attempt to prevent the reporting of an incident. There is an offence of concealing and disposal of evidence. Each sentencing Court tends to take these factors into account under the current sentencing guidelines. Adding further layers is unlikely to assist in deciding appropriate sentences. The totality factor and certainty are more likely to give design to the appropriate sentence as opposed to adding layers. Wrongly blaming others is currently within the sentencing guidelines where the issue of remorse is dealt with, the CLSA considers this to be both superfluous, and adding a further layer to the sentencing process.

Q.12. It is the view of the CLSA that this is an appropriate considered amendment. There is no need to comment further.

Q. 13. The CLSA do not feel that there is a need to respond to A19. The proposal is sufficient and long overdue. However, A20 causes concern. At what point does it seem that this factor could potentially be used as step 2 in future guidelines. The sentencing options for Terrorism Offences are sufficiently clear and require no further amendment.
A.21 and A.22 are more than adequately covered in all current sentencing guidelines.

Mitigating Factors

Q.14 Mitigating Factor

M.1. This does not require any additional comment.

M.2. This appears to be a subjective and uncertain step. There is a separate offence of facilitating and concealing offending, it cannot therefore be said that good character can be

used to mitigate an additional offence. If there is evidence of such an offence, it should be charged separately.

M.3. remorse. This brings into play the consideration of a Court being satisfied that remorse is genuine. It cannot be right that a defendant who pleads guilty to an offence at the first opportunity should have to prove genuine remorse. This is so subjective and likely to be unreliable. It promotes a lack of certainty, subjectivity should never form a part of any sentence. The Court already uses its own discretion. No evidence has been produced to suggest this is an ineffective or inconsistent position. Credit for an early guilty plea and remorse go hand in hand, no plea equates to no remorse. The effect of the proposed changes may be to, in some cases, discourage guilty pleas.

Q.15 In the experience of the CLSA, self reporting is so unlikely as to be of little merit when the issue of mitigation is concerned. In the breach of food safety and food hygiene regulations, or indeed any alleged offence, the concerns that the CLSA has is that there may be a tendency to self report when in fact there is no offence, or that there is a defence. Self reporting may be an inducement to acknowledge behaviour which does not constitute a criminal offence.

Revenue Fraud is a complex issue, and self reporting should be an aim which is used sparingly. There appears to be a tendency to simplify offences without appropriate consideration to the myriad of defences which may be available. The concerns that the CLSA have is that there is an assumption of guilt, and an inducement to plead to matters which may with hindsight and consideration either contain no criminal culpability, or have a statutory defence which cannot always be established by self referral.

Co-operation with the investigation and early admissions have, in the experience of those practising within the CLSA, always been factors to be taken into account. It has to be right that reducing stress on victims and witnesses should be taken into account, but the CLSA is of the view that such credit already exists. If this heading is intended to give additional credit, the concerns that those practising in the criminal justice system is as to how this should be applied.

Q.16 M6, little or no planning. This must be a relevant factor in certain circumstances. Offences which are opportune should, in the view of the CLSA be treated very differently from pre planned, and often more sophisticated acts. The courts have long utilised a discretion to consider such matters.

M7.This appears to be an attempt to rewrite the law as regards to Joint enterprise. The issue of joint enterprise has been revisited in Joshi several times over the past 2 years, and seems to offer clarity in these situations. How the Courts come to consider lesser roles, and whether the defendant has to prove that he or she acted in a lesser role is likely to give rise to confusion. This may also cause concerns for sentencing certainty, as surely these issues now make a Newton type hearing all but inevitable, thereby in all practical sense removing credit for an early guilty plea. This is not an area which the CLSA feels comfortable with.

M8 all but identifies a defence. For example, under the slavery and drugs trafficking regulations, this situation is covered. If duress is raised, then that is a defence, as is exploitation. It appears to the CLSA that there is a tendency to rewrite potential defences and turn them into mitigation. This is not the correct approach and shows a misunderstanding of the law, the burden and standard of proof, defences, and mitigation. Where the matters raised of this type fall short of a defence in law, the courts have

traditionally taken them into account where appropriate when considering sentence in any event.

Q.17
M.10 seems to be paradoxical. Unless an offence is one of strict liability, then if the defendant does not understand the extent of the offence, presumably intent, then this cannot be a mitigating factor, it must be a defence.

M.11 Delay since apprehension. This is a long overdue consideration

M. 12 there is little to be said as regards this recommendation.

Q.18

M13. This is, in the view of the CLSA, a long overdue consideration. The recent consultation on those vulnerable adults with mental health issues touches upon this a little. Young offenders who have little if any social parameters, and little understanding and maturity should indeed have this advanced as mitigation.

M.14 Sole or primary carer for dependant relatives. Often, those who are the sole or primary carers for relatives are the least able to secure the assistance that they need, which may, particularly in relation to benefit fraud, trigger offending which otherwise would not have occurred. This is rightly to be considered as a mitigating factor.

Q. 19

M15 must be relevant. If a defendant is unable to participate meaningfully or properly within Court proceedings, for example, if the defendant has endured a stroke, or heart failure before trial, and recuperation is lengthy, if at all, then the sentencing guidelines should consider this. If there is to be punishment or any Court Order, which cannot be imposed, the defendant must be given some consideration for his personal circumstances.

Mental disorder or learning disability. This has been the subject of an earlier consultation with regard to vulnerable defendants. The CLSA refers the consultors to that consultation.

M.17 where a defendant has taken steps to voluntarily address the cause of their behaviour, this must be a relevant consideration for a reduction in sentence. It addresses the situation of remorse in full as well as the issue of rehabilitation.

Q.20 The CLSA have nothing to add as regards to the proposed change, it is long overdue.

Q.21 The CLSA has nothing to add to this proposal.

Q. 22. The CLSA has nothing to add to these proposed changes. They are reflective of the need to address these issues.

Q. 23 The CLSA always endorses the need to review the way in which the sentencing exercise is carried out. However, there is a need for certainty and clarity, and guidelines are just that, "Guidelines". The risk of making sentencing a less scientific, and based on the risk of irrelevant issues being brought into play concerns practitioners at every level. Sentencing should carry certainty at every level, overcomplicating the process makes certainty less

likely. Too many subjective factors are at play. Personal mitigation can address the need for the Court to consider the appropriate sentence for the defendant, however, if too many factors come into play, the likelihood of uncertainty and abuse of the appeal process is all but inevitable.

Q. 24
The CLSA are not able to speculate on whether the proposals will have an impact on sentencing in practise. There are consistently different sentences imposed for similar offences in different regions often taking into account established local concerns and priorities. Different Judges and Judicial tribunals will have different views. Frankly, the more certain the guidelines, the greater transparency and consistency as opposed to blurring and attempting to tailor guidelines. Sentencing should be certain, not speculative. It is not the role of the CLSA or indeed any other organisation to try to establish what the proposed expanded factors would be.

Q. 25 No

Q. 26 .The CLSA would be grateful if the Council would consider the need for certainty and clarity as opposed to constantly changing and reviewing best practise.
Perhaps more training for the Judiciary as to what is expected of them when sentencing is considered, as opposed to tinkering around the edges, may be more appropriate.